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12 **UNITED STATES BANKRUPTCY COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 In re	)	Case No. 01-30923 DM
15	)	
16 PACIFIC GAS AND ELECTRIC	)	Chapter 11
17 COMPANY, a California corporation,	)	
18	)	Date: July 30, 2003
19	)	Time: 9:30 a.m.
20 Debtor.	)	Place: 235 Pine St. 22 <sup>nd</sup> Flr.
21	)	San Francisco, CA
22	)	

23 **U.S. TRUSTEE'S OBJECTION TO DISCLOSURE STATEMENT AND PLAN OF**  
24 **REORGANIZATION JOINTLY PROPOSED BY DEBTOR, ITS PARENT AND THE**  
25 **CREDITOR'S COMMITTEE**

26 **INTRODUCTION**

27 The United States Trustee for the Northern District of California hereby objects to  
28 the jointly proposed Disclosure Statement and Plan of Reorganization on a number of  
bases. The Disclosure Statement does not contain "adequate information" in sufficient  
detail as far as is reasonably practicable in light of the nature and history of the Debtor  
and the condition of the Debtor's financial records, that would enable a hypothetical  
reasonable investor to make an informed judgment about the plan. 11 U.S.C. §1125.  
Here, the amount and basis for payment of professional fees and costs is not

1 articulated. Further, the terms and time of effectiveness of the plan are not defined.  
2 The plan's lack of financial information and vagueness as to terms and effectiveness  
3 appear to make it un-confirmable as drafted. See *In re CRIIMI MAE, Inc.*, 251 B.R.  
4 796, (Bankr. D. Md. 2000).

5 I

6 **THE DISCLOSURE STATEMENT IS INADEQUATE**

7 A. Professional Fees and Expenses

8 1. Amounts of Fees not Disclosed

9 The Disclosure Statement does not provide any information whatsoever on the  
10 amount of potential administrative claims for "Professional Compensation and  
11 Reimbursement Claims" (professional fees and expenses). See Disclosure Statement  
12 page 13, lines 16-19. Under the estimated aggregate amount of allowed claim (in  
13 millions) the Debtor states, "Unknown." The facts of this case indicate the contrary is  
14 true. These claims are known or capable of estimation to a high degree of certainty.

15 Debtor has, in the past, represented that the Parent's claims for fees and costs  
16 could reach one to two hundred million dollars. The total fees and expenses, including  
17 Debtor, Parent and CPUC could reach over ½ billion dollars by projecting prior allowed  
18 fees and "estimates" of Parent and CPUC fees accrued and, undoubtedly  
19 billed/disclosed to the Parent and the CPUC. This is not an insubstantial amount, and  
20 should be stated as a monetary estimate of fees and expenses as of a given date.

21 2. No Justification for Fees to Parent and CPUC for Work Pre-confirmation

22 The Debtor proposes to reimburse the Parent (PG&E Corporation) and the  
23 Commission (California Public Utility Commission-"CPUC") "for all of their respective  
24 professional fees and expenses incurred in connection with the Chapter 11 case (this is  
25 a long list of entities doing pre-confirmation work ) without the need for any application  
26 under section 330 or 503(b) of the Bankruptcy Code." (emphasis added). See  
27 Disclosure Statement, Fees and Expenses., page 124, lines 24-28.

1 The only legal basis for payment of fees for pre-confirmation work by third parties  
2 - Parent and CPUC - is 503(b) which requires notice and hearing, as well as a showing  
3 of benefit and reasonableness.<sup>1/</sup> Payment of fees for work for the Debtor as Debtor-in-  
4 Possession ("DIP") is strictly controlled to protect the estate as well as the integrity of  
5 the process, and the Court has carefully controlled the payment of fees in this case.

6 The Debtor's proposal to circumvent compliance with the important requirements  
7 of 503(b) constitutes a term violating section 1129(a)(1), which requires a plan to  
8 comply with all provisions of the Bankruptcy Code. There has been no adequate  
9 explanation in the Disclosure Statement as to the legal basis for this fundamental  
10 circumvention of Code provisions that are required to preserve the integrity of the  
11 system.

12 To add further to the confusion over the Parent's recovery of fees, Exhibit 2,  
13 "Composition To Disclosure Statement For The Plan of Reorganization" (the  
14 "Settlement Agreement"), states: "PG&E shall not recover any portion of the amounts  
15 so paid or reimbursed to PG&E Corporation in retail rates; rather, such costs shall be  
16 borne solely by shareholders through a reduction in retained earnings." Page 22,  
17 Exhibit 2. Since the shareholders (Parent) have heretofore borne their own pre-  
18 confirmation costs, it is confusing and impractical to track, if the Debtor pays costs the  
19 shareholders will ultimately then absorb. In addition, tracking and monitoring these  
20 transactions by which the Parent's professional fees and costs are absorbed over time  
21 will be impractical, if not impossible.

### 22 3. Operation During the Gap Period Creates Financial Uncertainty

23 Creation of the Reorganized Debtor and re-vesting of the assets occurs on the  
24 Effective Date of the Plan, "the tenth(10th) Business Day after the Distribution Record  
25

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26 <sup>1/</sup> Arguably, 1129(a)(4) provides some review and approval for reasonableness,  
27 however, the specific dictates of 503(b) should control based upon policy and  
lack of authority for the use of 1129(a)(4) for this sweeping purpose.

1 Date. The Distribution Record Date, as defined in the Plan, is the first Business Day  
2 after the date on which the myriad conditions specified in Section 8.2 of the Plan have  
3 been satisfied or waived by the Proponents." See Disclosure Statement, p. 134, lines  
4 16-21.

5 The Disclosure Statement provides a more detailed discussion of the effective  
6 date of the Plan at page 112. The Disclosure Statement discusses various conditions  
7 that must be met or can be waived by the Proponents. The Disclosure Statement  
8 refers to March 31, 2004 as an outside effective date, however, it can be waived or  
9 modified apparently indefinitely. See page 112 at line 4. The preconditions listed are  
10 characterized by the debtor as risky and uncertain.<sup>2/</sup> See, Plan, pp. 69-70, and  
11 Disclosure Statement, p. 112.

12 Only one thing is certain from all this, the Effective Date of the Plan - the actual

13  
14 <sup>2/</sup> Conditions Precedent to Effectiveness. The Plan shall not become  
15 effective unless and  
16 until the following conditions shall have been satisfied or waived pursuant to  
17 Section 8.4 hereof:

18 (a) the Effective Date shall have occurred on or before March 31, 2004;

19 (b) all actions, documents and agreements necessary to implement the  
20 Plan shall have been effected or executed;

21 (c) the Debtor and the Parent shall have received all authorizations,  
22 consents, regulatory approvals, rulings, letters, no-action letters, opinions  
23 or documents that are determined by the Debtor and the Parent to be necessary  
24 to implement the Plan;

25 (d) S&P shall have issued a long-term issuer credit rating for the  
26 Reorganized Debtor of not less than BBB-, and Moody's shall have issued an  
27 issuer rating for the Reorganized Debtor of not less than Baa3.

28 (e) S&P and Moody's shall have issued credit ratings for the New Money  
Notes of not less than BBB- and Baa3, respectively;

(f) The Commission shall have given its Final Approval of the Commission  
Settlement Agreement on behalf of the Commission;

(g) Each of the parties to the Commission Settlement Agreement shall  
have executed and delivered to one another counterpart copies of the  
Commission Settlement Agreement;

(h) The Commission shall have given its Final Approval for all rates,  
tariffs and agreements necessary to implement the Plan;

(i) The Commission shall have given its Final Approval for all of the  
financings, securities and accounts receivable programs provided for in the  
Plan;

(j) the Plan shall not have been modified in a material way, including  
any modification pursuant to Section 11.11 hereof, since the Confirmation  
Date; and

(k) the Reorganized Debtor shall have consummated the sale of the New  
Money Notes under by the Plan.

1 date - cannot be ascertained with certainty in terms of a year or even years, and there  
2 is no reorganized debtor or re-vesting until that point. Consequently, during the Gap  
3 period, this Debtor will remain a Debtor-In- Possession, and must by law be required to  
4 continue to comply with all applicable Code provisions of a debtor-in-possession  
5 regarding administrative claims and professional fees and expenses.

6 However, without explanation or legal justification, this Debtor proposes to pay  
7 administrative claims and professional fees and expenses in the "ordinary course"  
8 during this Gap period - without application, disclosure, review or approval. Should the  
9 plan not become effective, there is no reorganized debtor, and  
10 all Gap transactions would be unwound by the terms of the plan. Disclosure  
11 Statement, p. 113. Aside from the lack of justification for abrogating DIP controls on  
12 fees during the Gap when Debtor is clearly a DIP, the unwinding would be nearly  
13 impossible without the oversight the DIP fee and administrative approval requirements  
14 impose.

15 B. Fundamental Vagueness as to a Time Certain for Effectiveness or Alternatives

16 The Disclosure Statement and Plan do not provide a time certain for  
17 effectiveness or implementation of a clearly defined alternative. The many conditions  
18 to effectiveness are accurately stated as risky as to occurrence and timing. An  
19 alternative plan is not described. Indefinite waivers, extensions and modifications  
20 appear contemplated, and, potentially, such changes would be so fundamental as to  
21 require a new plan and solicitation. Accordingly, the Disclosure Statement is  
22 fundamentally vague, giving virtually no hint as to the timing of actual effectiveness nor  
23 any concrete alternatives.

24 II

25 **THE PLAN AS PROPOSED REQUIRES MODIFICATION TO BE CONFIRMABLE**

26 Based on the forgoing general uncertainty and the terms specifically violating  
27 the Code, the Plan, as drafted, may not be confirmable as a matter of law, and the

1 Disclosure Statement should not be approved and sent to the creditors. *In re CRIIMI*  
2 *MAE, Inc.*, *supra*, 251 B.R. 796.

3 There should be a more definitive discussion of alternatives. Everything, in  
4 reality, hinges on a state agency's (CPUC) regulatory approval with the binding effect of  
5 appeals being exhausted. It appears the proposed plan may have to be continually  
6 tinkered with and modified. It would not serve the creditors as it stands to disseminate  
7 a disclosure statement, until certainty exists *vis a vis* the CPUC. In addition, a more  
8 definitive discussion of alternatives is necessary.

9 In addition to its vagueness, the attempt to circumvent the requirements of  
10 section 503(b) with respect to the proposed reimbursements to the Parent and the  
11 Commission, not only violate section 503(b) but section 1129(a)(1) which requires plan  
12 terms to be proper and consistent with the Code. Likewise, payment of the Debtor,  
13 Parent and the CPUC in the ordinary course during the Gap period is not proper or  
14 practical given the possibility of unwinding. These matters must be more fully  
15 addressed prior to approval of the Disclosure Statement as well as the Plan.

16 Finally, there is no provision for payment of U.S. Trustee fees and periodic  
17 reports after confirmation until there is a final decree, as required by 18 U.S.C. §1930  
18 and Rule 2015.

### 19 III

#### 20 MEMORANDUM OF POINTS AND AUTHORITIES

21 The Debtor Has Not Complied With §1125 Requiring Adequate  
22 Information. Section 1125(a)(1) requires that the disclosure statement contain  
23 "adequate information" in sufficient detail as far as reasonably practicable in light of the  
24 nature and history of the debtor and the condition of the debtor's financial records. It  
25 must be such information as would enable a hypothetical reasonable investor to make  
26 an informed judgment about the plan. 11 U.S.C. § 1125 (a) (1); Also see *Vol. 7 Collier*  
27 *on Bankruptcy* ¶ 1125-5[2] (Alan N. Resnick & Henry J. Sommer eds., 15<sup>th</sup> ed. rev.).

1 S.Rep. 989, 95<sup>th</sup> Cong., 2d. Sess. 121, *reprinted in* 1978 U.S. Code Cong. & Admin.  
2 New 5787, 5907.

3 While the Debtor cannot be expected unerringly to predict the future, the  
4 information to be provided should be comprised of all those factors presently known to  
5 the plan proponent to bear upon the success or failure of the proposals contained in the  
6 plan. *In re Ligon*, 50 B.R. 127, 130 (Bankr. M.D. Tenn. 1985). See *In re California*  
7 *Fidelity, Inc.*, 198 B.R. 567 (9<sup>th</sup> Cir. BAP (Cal.) 1996)(The purpose of a post-petition  
8 disclosure statement is to give all creditors a source of information which allows them to  
9 make informed choice regarding approval or rejection of plan).

10 Disclosure is the pivotal concept in reorganization practice under the Code.<sup>3/</sup>  
11 *Collier on Bankruptcy, supra*, at ¶ 1125.02. Required information would include  
12 information regarding the amount of claims against the estate. *Id.*, at ¶ 1125.02[2]; See  
13 also *In re Scioto Valley Mortgage Co.*, 88 B.R. 168 (Bankr. S.D. Ohio 1988); *In re Copy*  
14 *Crafters Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1998).

15 As set forth above, information is completely lacking as to the factual and legal  
16 basis for professional fees and expense payments during the pre-confirmation and pre-  
17 effectiveness periods.

18 The Debtor's proposal in the Plan to reimburse the Parent and the Commission  
19 for all their respective fees and expenses incurred in connection with the Chapter 11  
20 Case, without the need for any application under §503(b) of the Bankruptcy Code is not  
21 a proper option the Debtor has as its disposal. Nor is the proposal to pay Debtor, its  
22 Parent and the CPUC's fees and expenses as "ordinary course" proper during the Gap  
23 period (from Confirmation to Effective Date).

24 Section 503(b) mandates that such fees and expenses be allowed to certain third

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25 <sup>3/</sup> H.R Rep. No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 226-231 (1977), *reprinted in* App.  
26 Pt. 4(d)(i) *infra*. The Congressional intent to require full disclosure for  
27 reorganization purposes is made abundantly clear in chapter 11. *In re Cyr*  
*Bros. Meat Packing, Inc.*, 2 B.R. 620 (Bankr. D. Me. 1980).

1 parties only after notice and a hearing, as well as a showing of benefit conferred. See  
2 11 U.S.C. §503(b); and, *In re Napa Valley Physicians Plan*, 266 B.R. 455, (Bankr. N.D.  
3 Cal. 2001) which held that because administrative expense claims are paid at the  
4 expense of other creditors, their allowance is narrowly construed and strictly limited to  
5 the actual, necessary costs and expenses of preserving the estate, and must be  
6 applied to pre-confirmation work. <sup>4/</sup>

7 Section 330(a)(1) of the United States Bankruptcy Code like §503 provides that  
8 after notice to the parties in interest and the United States Trustee and a hearing, ... the  
9 court may award to a trustee, an examiner, a professional person or attorney employed  
10 under section 327 or 1103 reasonable compensation for actual, necessary services  
11 rendered by a trustee, examiner, professional person or attorney... and reimbursement  
12 for actual, necessary expenses. See 11 U.S.C. §330(a)(1)(A) and (B). Again the  
13 purpose is to assure that this priority, to the detriment of other creditors, is proper and  
14 must be applied to the Gap period.

15 All these claims are substantial, perhaps half a billion dollars. Therefore, scrutiny  
16 of professional fees and costs should continue until the plan's effective date.

17 In addition, there is considerable confusion and contradiction between the  
18 Disclosure Statement and Settlement Agreement with respect to reimbursement to the  
19 Parent for administrative expenses. On the one hand the Debtor proposes to  
20 reimburse the Parent for administrative expenses, and, on the other hand, the  
21 Settlement indicates that the shareholders of the Debtor's Parent corporation, shall  
22

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23 <sup>4/</sup> Requests for payment of administrative expenses are not entitled to the  
24 presumption of correctness that is accorded claims pre-petition creditors  
25 assert through proofs of claim. The "notice and a hearing" standard of section  
26 503(b), although not necessarily requiring an actual hearing if notice is  
27 properly given and no objection requiring court adjudication has been  
interposed, generally requires specific approval of administrative expenses by  
court order as a condition to allowance. *Id.* Many courts recognize that they  
have an independent duty to scrutinize and rule on administrative expense  
applications, especially fee applications, even absent objection. *MAE, Inc.*,  
251 B.R. 796, (Bankr. D. Md. 2000) *Id.*



1 bear the costs of administrative expenses by reducing retained earnings. Given that  
2 the Parent has borne its fees and costs thus far and future awards may be unwound, it  
3 would be improvident as well as impractical to allow such a reimbursement scheme.

4 The major contingency is whether the CPUC will approve the proposed  
5 settlement and appeals will be exhausted. Yet there is no concrete end to this  
6 contingency nor any specific proposal for an alternative. The contemplated alternative  
7 of waiver and undefined modification stretching on for a year or years result in  
8 inadequate disclosure. Bankr.Code, 11 U.S.C.A. § 1125(b); *In re Unichem Corp.*, 72  
9 B.R. 95 (Bankr. N.D. Ill. 1987), *affirmed* 80 B.R. 448 (N.D. Ill. 1987).

#### 10 CONCLUSION

11 As set forth above, the terms for payment of professional fees and costs, as well  
12 as lack of provision for U.S. Trustee fees and reporting are improper. In addition, the  
13 effective date cannot be determined, nor is there a certain alternative. Accordingly, the  
14 Disclosure Statement should not be approved nor the Plan, as proposed, be confirmed.  
15 The U.S. Trustee respectfully requests that his objection to the Disclosure Statement  
16 and Plan be sustained.

17  
18 Dated: July 23, 2003

Respectfully submitted,

19   
20 Patricia A. Cutler

Assistant U.S. Trustee

1 **PROOF OF SERVICE**

2 I, the undersigned, state that I am employed in the City and County of San Francisco,  
3 State of California, in the Office of the United States Trustee, at whose direction the service was  
4 made; that I am over the age of eighteen years and not a party to the within action; that my business  
address is 250 Montgomery Street, Suite 1000, San Francisco, California 94104, that on the date set  
out below, I served a copy of the attached:

5 **U.S. TRUSTEE'S OBJECTION TO DISCLOSURE STATEMENT AND PLAN OF**  
6 **REORGANIZATION JOINTLY PROPOSED BY DEBTOR, ITS PARENT AND THE CREDITOR'S**  
**COMMITTEE**

7 each party listed below by placing such a copy, enclosed in a sealed envelope, with prepaid postage  
8 thereon, in the United States mail at San Francisco, California, addressed to each party listed below  
and was served by FACSIMILE.

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20 Co-Counsel to PG&E Corp for  
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22 I declare under penalty of perjury that the foregoing is true and correct. Executed at San  
23 Francisco, California July 23, 2003

24 By:   
25 A. LEE  
26  
27  
28